No. 86-944

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

EUGENE SULLIVAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

SUPPLEMENTAL APPENDIX

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APPENDIX B—BENCH OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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(Call to Order of the Court).

THE COURT: I want to deliver a bench opinion in this case. I think it's better to decide these things when—right after the argument when all the arguments are fresh in my mind, and the closer a case is decided to the time of trial makes it easier for the trial court to recollect what happened at the trial. I reserve the right to correct errors in spelling, grammar or syntax, and to add citations and footnotes in the event of an appeal.

BENCH OPINION

I. *FACTS*

Eugene Sullivan, a former chief inspector of the Philadelphia Police Department, and four other former policemen were named in a thirty count indictment, charging the named persons with violations of the Hobbs Act, 18 U.S.C. Section 1951, including conspiracy and substantive offenses. Two of the policemen, John Czmar and William Maahs, pleaded guilty to the various charges against them. Strike that. I want to read that sentence again. Two of the policemen, John Czmar and William Maahs, pleaded guilty to some of the charges against them. (Pause). We were right the first time. We'll go back and read it for a third time, and this is the way I want it typed in the opinion. Two of the policemen, John Czmar and William Maahs, pleaded guilty to the various charges against them. In November 1985, a trial was held [3] for the three remaining defendants. At the trial, gambling and video poker machine operators testified concerning monthly protection

payoffs. These payoffs, which amounted to ten to fifteen thousand dollars per month, were made to members of the vice squads of the East and Northeast Police Divisions. Five former policemen testified about their personal involvement in this extortion scheme.

In his defense, Mr. Sullivan took the stand and denied all of the charges against him. Also, the defendant called over fifty witnesses who testified to his good character. The jury found Mr. Sullivan guilty of conspiracy and fourteen substantive Hobbs Act violations. Defendants Walter McDermott and Robert Schwartz were also found guilty of numerous violations of the Hobbs Act.

Defendant Sullivan has requested post trial relief from his convictions based on four alleged errors committed by the trial court. After reviewing the briefs submitted and listening to today's oral argument, I find that no errors were committed by the Court in the course of the three week trial. Therefore, for the following reasons I deny post trial relief to the defendant.

II. *JUDGES AS CHARACTER WITNESSES*

First, the defendant argues that the Court prohibited the defense from calling as character witnesses ten Pennsylvania state court judges. Specifically, Mr. Sullivan's [4] lawyer objected to my order that he first call all of the non-judicial character witnesses. Defense counsel also objected when I, after evaluating all of the character testimony on behalf of Mr. Sullivan, ruled that the judges should not be called because their testimony would be cumulative. In his brief, the defendant also argues that Pennsylvania Judicial Administration Rule 1701 is unconstitutional. The rule requires the prior approval of the Pennsylvania Supreme Court for any state judge who wishes to testify as a character witness. The defense counsel alleges that

the Supreme Court's denial of permission for those judges to testify in this case limited the defendant's ability to present a competent and effective defense and is therefore unconstitutional.

The question of allowing judges to testify as character witnesses in a trial is a sensitive issue. Civil Rule 9 of the Local Rules of the Eastern District of Pennsylvania limits the subpoenaing of federal judges as character witnesses to certain specific situations where the judge's testimony would not be cumulative and an order prohibiting the testimony would prejudice the petitioner. The Pennsylvania state rule is similar to this local rule. Opinion 15 of the American Bar Association Committee on Professional Ethics provides more guidance on how a judge should determine whether to testify as a character witness. Although Opinion 15 agrees that there is nothing in the [5] Canons of Judicial Ethics to prevent a judge from testifying as a character witness, it notes that a judge who does testify necessarily gives the defense the weight of his judicial position and dignity. A judge "should consider . . . the propriety of testifying and determine whether his testimony is necessary and appropriate to give a fair trial to the accused, or is merely an attempt of the defense to throw into the scales the weight of his judicial position." *See also* Advisory Opinion #9, *Code of Judicial Conduct for United States Judges.* These various authorities highlight possible problems which could arise if a judge were allowed to testify as a character witness.

To determine the importance to the defendant of these judges as character witnesses, I instructed defense counsel to call his non-judicial character witnesses first. My decision to do this is well within the boundaries of the discretion of the trial judge. As the Supreme Court stated in *Geders,* G-E-D-E-R-S, *versus United States,* 425 U.S. 80 (1976):

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> The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion.

[6] *Geders*, G-E-D-E-R-S, 425 U.S. at 87. *See also U.S. versus Continental Group, Inc.*, 456 F.Supp. 704 (E.D. Pa 1978) (allowing co-conspirator's statements into testimony before ruling was made as to admissibility); *U.S. v. Cylkowski*, 556 F.2d 799, 802 (6th Cir. 1977). Therefore, no error was committed by requiring the defense to present his witnesses in a particular order.

The Court of Appeals for the Third Circuit has held that district court judges have wide discretion in limiting the number of defense witnesses called to the stand. *See U.S. v. Somers*, S-O-M-E-R-S, 496 F.2d 723, 735-36 (3d Circuit 1974); *U.S. v. Baysek*, B-A-Y-S-E-K, 212 F.2d 446 (3d Circuit 1954); (Judge can limit character witnesses after seven have testified). Because of the seriousness of the crimes to which the defendant has been indicted and the importance of the credibility of the parties involved, I allowed the defense to call 25 witnesses to testify to Mr. Sullivan's good character. Another 26 persons were allowed to come forward to acknowledge the defendant's good character. Among the witnesses who testified were a priest, a state senator, some high ranking police officers and several attorneys.

After the 51 witnesses gave their testimony, I evaluated all of the character evidence that was admitted on behalf of Mr. Sullivan. I concluded that more than a sufficient amount of evidence had been given and that any more similar evidence would

be cumulative. Relying on the *Baysek* [7] precedent and Rule 403 of the Federal Rules of Evidence, I prohibited any more character witnesses from testifying. At this point in the trial, preventing the judges from testifying did not harm Mr. Sullivan's defense. The testimony already admitted into evidence tended to show Mr. Sullivan's character to be outstanding and nothing would have been added by more testimony. Furthermore, by not allowing the judges to testify, I eliminated the problems that might arise whenever a judge takes the witness stand as a character witness.

The defense counsel's argument concerning the constitutionality of the Pennsylvania rule has little bearing on this case. Although the Pennsylvania Supreme Court denied permission for the judges to testify, I nevertheless ordered that subpoenas could be issued to summon these judges. On the record, I explicitly found that the Pennsylvania rule is not binding on th federal courts and I acted accordingly. Therefore, it is unnecessary to discuss the constitutionality of a state rule which had almost no bearing on my decision to prohibit the state judges from testifying. In conclusion, all of the Court's actions in regard to this issue were within the trial judge's discretion. On review of this issue, I find no reason to grant any relief to the defendant because no error was committed by the Court.

III. *SUFFICIENT INDEPENDENT EVIDENCE OF CONSPIRACY*

The defendant urges that the trial court erred [8] when it determined that sufficient independent proof of a conspiracy existed to link Eugene Sullivan to the conspiracy and to allow the admission of co-conspirators' statements in the case. The defendant's arguments are without merit. It is undisputed that an extortion conspiracy existed. I found more than sufficient

evidence to link Mr. Sullivan to this conspiracy.

Without reviewing every witness and every aspect of the case, it is clear that sufficient evidence existed to conclude by a preponderance of the evidence that Mr. Sullivan was part of the conspiracy. The former police officers involved in the extortion scheme testified to various conversations with Sullivan which either identified him as a participant or raised reasonable inferences that he was involved in the scheme. John Czmar testified that he personally gave Eugene Sullivan approximately thirty-five hundred dollars per month as Sullivan's share of the payoffs. Video poker machine vendors testified that they had gone to Sullivan's office to arrange protection payoffs and Sullivan had referred them to the vice lieutenant, who then arranged for payment. Considered in the aggregate, this evidence is sufficient to support my finding that a single conspiracy existed and that Sullivan was a part of it. Similarly, this same evidence is more than adequate to support my ruling which allowed the admission of the statements of co-conspirators. Thus I was [9] justified in finding that there was sufficient evidence to conclude that Eugene Sullivan was part of the extortion conspiracy.

IV. *USE OF TAX RETURNS AND DISCLOSURE STATEMENTS TO CROSS-EXAMINE DEFENDANT*

Next, the defendant argues that it was improper for the Court to allow the prosecution to question Mr. Sullivan about his tax returns and disclosure statements during cross-examination. The defense counsel reasons that since Mr. Sullivan was not examined on direct examination—I want to change that sentence. The defense counsel reasons that since Mr. Sullivan was not questioned on direct examination about the accuracy of his tax returns, it was an improper subject for any cross-examination. Citing *U.S.*

versus Dennis, 725 F.2d 782 (8th Circuit 1980), defense counsel also claims that tax problems are not indicative of a lack of truthfulness.

Rule 608(b) of the Federal Rules of Evidence provides that:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness [10] or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, . . .

This rule has been interpreted to mean that an examiner may ask the witness a question but he is forced to take the witness's answer. The cross-examiner is not allowed to bring other evidence or witnesses to discredit that testimony. *See Carter v. Hewitt,* 617 F.2d 961, 969 (3d Circuit 1980); 3 J. Weinstein & M. Berger, Weinstein's Evidence, Section 608(05), at 608-22 (1978). However, when evidence is obtained from the very witness whose credibility is under attack, the evidentiary rule's core concerns are not violated. *See Carter,* 617 F.2d at 970.

In the case at hand, it seems clear that the Government prosecutors were entitled to question Mr. Sullivan about his tax returns. Because a person is required to sign his tax returns under the penalty of perjury, they are probative of a person's truthfulness. *See U.S. v. Zandi,* Z-A-N-D-I, 769 F.2d 229, 236 (4th Circuit 1985). Since the major issue in this case was the credibility of the various witnesses who testified, including Mr.

Sullivan, questioning Mr. Sullivan about his tax returns is permissible under Rule 608(b). The Court explicitly warned the prosecution not to present any extrinsic tax return evidence nor to display the returns to the jury. The prosecutors followed these [11] instructions and merely questioned the defendant about various aspects of his tax return.

Defendant suggests that the cross-examination was more prejudicial than probative under Federal Rule of Evidence 403. In my view, the probative value is not "substantially outweighed" by possible prejudice, especially in light of the defendant's plausible explanation.

V. *THE NORTHEAST ARREST BOOK*

Finally, the defense argues that the prosecution's utilization of the Northeast arrest book in its closing rebuttable was improper. The defendant claims that the book was admitted into evidence for a very limited purpose and could not be used in the manner in which it was used. Although I have not reviewed the transcripts of the book's admission into evidence, my notes and recollection reflect that the Northeast arrest book was admitted without objection. The defendant has provided no authority to substantiate his claim that evidence can be used only for the limited purpose for which it was originally used at trial. Also, the defendant was given ample warning to anticipate the prosecution's use of the book in its closing. Defendant's attorney neither referred to this book in his closing nor did he take any other steps available to him to limit the use of the exhibit. I conclude that it was not error to allow the Government to refer to the arrest book in their closing rebuttal. In any [12] event, any error in this regard would appear to be harmless.

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In conclusion, I find that no reversible errors were committed by the Court during the three week trial. Mr. Sullivan received a fair trial and his lawyer was able to present a competent and effective defense. I find that the jury verdict should stand and that no relief should be granted to the defendant. An appropriate order will be entered.

Mr. Klein, will you prepare an order which denies the post trial motions filed by Mr. Fitzpatrick, and when do you want to have sentencing for the defendant?

MR. KLEIN: Your Honor, I will prepare the order. The Government is prepared to sentence at whatever time is appropriate to the Court. I understand that the sentence of McDermott and Schwartz has been scheduled for February 24th. If the Court wants to do them jointly, we could do it then; if the Court wants to do it separately, perhaps the following week.

THE COURT: How about March 3rd?

MR. KLEIN: That's fine with the Government, Your Honor.

THE COURT: Is it the 24th for Schwartz and McDermott?

MR. KLEIN: Yes, it is.

THE COURT: How about March 3rd, Mr. Fitzpatrick?

[13] MR. FITZPATRICK: I think that's all right, sir. I don't have another commitment that I know of, except for Judge McGlynn on March 10th.

THE COURT: All right. Then if you would have

sentencing—I just want to check with my secretary to make sure that March 3rd is a good day. (Pause). We can make it 9:30 in courtroom 3B in this courthouse.

MR. KLEIN: Very well.

THE COURT: Monday, March 3rd.

MR. KLEIN: Thank you, Your Honor.

THE COURT: Prepare an order; put this sentencing date in the order. Has a presentence report been prepared?

MR. KLEIN: I understand it has, Your Honor.

THE COURT: Okay.

MR. KLEIN: We would ask one thing, that we'd be able to have access to the financial portion of that as soon as possible so that we can compare—that is Mr. Sullivan's financial data that was submitted. We would like to look at that.

THE COURT: I have no objection if you have access. Is there any problem?

MR. KLEIN: All right. Because we asked the probation officer. He said to go through the Court. So I'm just bringing it up.

THE COURT: Yes, you may have access to it. [14] Speak to Mr. Gershenfeld. He'll see that you get it.

MR. KLEIN: Thank you.

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MR. FITZPATRICK: I've recently received an order from Mr. Gooch in another matter which indicates that it's now the practice in this District to mail you copies of the presentence report. Is that true in this case?

THE COURT: That's being implemented, yes. I'm not sure . . .

MR. FITZPATRICK: Well then can I assume that I will receive a copy?

THE COURT: You better check with Mr. Gooch's office . . .

MR. FITZPATRICK: Very good, sir.

THE COURT: . . . to avoid the similar kind of problems we had with regard to the transcript.

MR. FITZPATRICK: Very good, sir.

THE COURT: Anything else?

MR. KLEIN: The Government has nothing further, Your Honor.

MR. FITZPATRICK: May we be excused?

THE COURT: All right. You may be excused. This Court stands in recess until 2:00.

MR. KLEIN: Thank you, Your Honor.